

69926-1

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NO. 69926-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANIL APPUKUTTAN,

Appellant,

v.

OVERLAKE MEDICAL CENTER;
PUGET SOUND PHYSICIANS, PLLC;
ALAN B. BROWN, M.D.; MARCUS TRIONE, M.D.;
and TINA NEIDERS, M.D.;

Respondents.

BRIEF OF RESPONDENTS

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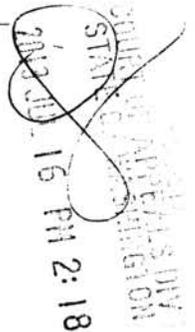


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I. INTRODUCTION

None of the arguments Mr. Appukuttan makes on appeal were properly preserved for review. In the trial court, he excepted to Court's Instruction No. 10, the exercise of judgment pattern instruction, WPI 105.08,¹ CP 23, solely on the ground that, although it properly may be given in some medical malpractice cases, the evidence in this case did not warrant giving it. On appeal, however, he argues that WPI 105.08 is "preempted" by or inconsistent with RCW 7.70.040, such that the giving of it should be prohibited in all medical malpractice cases. Because his CR 51(f) exception did not preserve such an argument for review, this Court should not consider it and should dismiss the appeal.

Even if this Court were to overlook Mr. Appukuttan's failure to preserve his arguments for appeal, his arguments merely recycle ones that have already been rejected. *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986), settled, and *Christensen v. Munsen*, 123 Wn.2d 234, 867 P.2d 626 (1994), re-confirmed, that it is not error to give a "judgment" instruction to supplement and clarify a standard-of-care instruction based on RCW 7.70.040. As the *Watson* court explained, it is proper to remind juries, as the exercise of judgment instruction does, that medicine is an

¹ 6 Washington Practice: Washington Pattern Jury Instructions: Civil 105.08, at 612-13 (6th ed. 2012).

inexact science. The instruction denies traction to arguments that malpractice occurs simply because a diagnosis proves to be incorrect or a given treatment fails to cure. The instruction informs juries, correctly and properly, that if, in arriving at the judgment to follow a particular course of treatment or to make a particular diagnosis, a physician exercised reasonable care and skill within the standard of care the physician was obliged to follow, then the physician is not liable for selecting one of two or more alternative courses of treatment or diagnoses. Here, Mr. Appukuttan does not even acknowledge the reasons why the Supreme Court has authorized the giving of such instructions in medical malpractice cases, much less shown that any of the conditions for declining to honor *stare decisis* principles are satisfied such that an appellate court should consider repudiating past decisions.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did plaintiff's CR 51(f) exception to Court's Instruction No. 10, CP 23, fail to preserve for review the arguments he now makes on appeal concerning the "exercise of judgment" instruction, WPI 105.08?

2. If the Court were to overlook plaintiff's failure to raise any of the arguments he makes on appeal in his CR 51(f) exception below:

(a) have plaintiff's arguments that WPI 105.08 has been preempted by, or is inconsistent with, RCW 7.70.040 already been rejected; and

(b) has plaintiff failed to make the clear showing required for this Court to depart from the doctrine of *stare decisis* and repudiate prior cases that have long approved the giving of “error of judgment” instructions in medical malpractice cases where the defendant physician was confronted with a choice among competing forms of treatment or among medical diagnoses and there is evidence that, in arriving at a judgment, the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow?

III. COUNTERSTATEMENT OF THE CASE

Anil Appukuttan sued Drs. Alan Brown, Marcus Trione, and Tina Neiders, alleging malpractice for which Overlake Medical Center and Puget Sound Physicians, PLLC, have vicarious liability. CP 1-7. He claimed that, when he repeatedly sought treatment after being kicked in the leg on a soccer field, each physician failed to properly treat his injury and misdiagnosed his condition as either hematoma or cellulitis, instead of compartment syndrome, causing him to have muscle necrosis and a permanent foot drop. CP 2-6, 12-13; 12/3/12 RP 21, 34, 50.

The case was tried to a jury. The trial court gave a standard of care instruction substantially identical to WPI 105.02,² CP 22 (Court’s

² Court’s Instruction No. 9 had one paragraph specifying the standard of care applicable to plaintiff’s claim against Dr. Alan Brown, an orthopedic surgeon, and another

Instruction No. 9), as to which Mr. Appukuttan has not assigned any error or offered any argument. The court also gave verbatim the “exercise of judgment” instruction, WPI 105.08, CP 23 (Court’s Instruction No. 10), which told the jury:

A physician is not liable for selecting one of two or more alternative courses of treatment or diagnoses, if, in arriving at the judgment to follow the particular course of treatment or make the particular diagnosis, the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow.

Mr. Appukuttan’s counsel excepted to Court’s Instruction No. 10 on the ground that:

Under the *Christensen v. Munson* and *Watson v. Lockett* [sic, *Hockett*] cases and the comment to the WPI, this instruction, first of all, is only to be given with caution, and it ... may be used only when the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses.

Those conditions do not exist in this case because there wasn’t a choice among competing therapeutic techniques.

11/28/12 RP 89 (followed by counsel’s assertions concerning the trial testimony, *id.* at 89-90, not quoted here). After Overlake Hospital Medical Center’s counsel responded, 11/28/12 RP 91, Mr. Appukuttan’s counsel replied:

It [the exercise of judgment pattern instruction] should be given in cases like *Christiansen*, or let’s put it this way.

paragraph specifying the standard of care applicable to plaintiff’s claim against Dr. Marcus Trione and Dr. Tina Neiders, emergency medicine physicians.

It's not error to give it in cases like *Christiansen vs. Munson* [sic] when a doctor is choosing between two drugs to provide therapy, but that – this is not that kind of case, and it is not appropriate to treat that as – to treat a presumption that this instruction should be given in general in any case involving clinical judgment, and that is the point that I'm trying to persuade the Court on.

11/28/12 RP 92. The trial court explained that “the evidence fairly read can be interpreted to show that there were different types of diagnoses reasonably made and different treatments that would follow from differential diagnoses,” such that giving the exercise of judgment instruction was appropriate. *Id.* at 93.

By special verdict, the jury found that the defendants were not negligent, and did not reach questions of proximate causation or damages. CP 8-9. The court entered judgment on the verdict. CP 32-34. Mr. Appukuttan does not claim that there was insufficient evidence to support the jury's verdict or the entry of judgment on that verdict.

Mr. Appukuttan timely moved for a new trial. CP 35-51. He renewed the argument he made in excepting to the giving of Court's Instruction No. 10, *i.e.*, that the exercise of judgment pattern instruction should not have been given based on the evidence presented at trial *in this case*. 11/28/12 RP 89-90, 92; CP 36-37, 46-49. He also made several arguments that his counsel had *not* made when taking his CR 51(f) exception to Court's Instruction No. 10.

For the first time in his new trial motion, Mr. Appukuttan asserted that the exercise of judgment pattern instruction is an improper “negative” instruction, CP 35, 37, 49, is a comment on the evidence, CP 36, 37, 49, and is not helpful to the jury, invites the defense to create confusion as to what the applicable standard of care is, and unfairly emphasizes “the defense’s theory of the case,” CP 49. He has not renewed any of those arguments on appeal.

Mr. Appukuttan also asserted for the first time in his new trial motion that (1) giving the exercise of judgment instruction is “the practical equivalent of giving the defense a directed verdict,” CP 45, an assertion he repeats on appeal, *App. Br. at 23*; and (2) that “ordinary members of society” would not be “allowed to claim as a defense that they exercised ‘judgment’ within their own subjective standard of care in failing to yield the right of way, or in marketing a defective product, or in violating a building code,” CP 46, an assertion similar to one he makes on appeal, *App. Br. at 24*.

The main new argument Mr. Appukuttan made in his motion for new trial was that the “exercise of judgment” pattern instruction should not have been given at all because, under RCW 7.70.040, the applicable standard of care is “the degree of care, skill, and learning expected of a *reasonably prudent* health care provider [italics by plaintiff]” which,

according to him, is an objective standard and the exclusive one, whereas the “exercise of judgment” pattern instruction allows a jury “to determine the defendants’ liability based on the *subjective*, common law ... standard of care in WPI 105.08 [italics by plaintiff],” rather than on the RCW 7.70.040 standard, and is incompatible and in conflict with the statutory standard. CP 36, 39-41, 43-45. Mr. Appukuttan renews much of that argument on appeal, *App. Br. at 11-18*, although he now characterizes it as a “preemption” argument.³

The trial court denied plaintiff’s motion for new trial. CP 137-38; 1/10/13 RP 29-36. Plaintiff timely appealed. CP 139-52.

IV. STANDARD OF REVIEW

For reasons explained in Part V.A. below, this Court should not reach the merits of Mr. Appukuttan’s appellate arguments concerning the giving of Court’s Instruction No. 10, because he did not preserve them for review as required by CR 51(f). If this Court agrees, no standard of review needs to be applied.

If this Court reaches the merits of appellant’s arguments concerning the trial court’s giving of Court’s Instruction No. 10, the “exercise of judgment” instruction, WPI 105.08, as a supplement to a

³ Plaintiff’s counsel characterized the argument as a “preemption” argument for the first time in his reply in support of his new trial motion. CP 78.

proper standard of care instruction in a medical malpractice case, ordinarily “[t]he determination of whether to give a supplemental ‘error of judgment’ instruction is discretionary with the trial judge.”⁴ And, on review of challenges to jury instructions, the inquiry ordinarily “is whether the trial court abused its discretion by giving or refusing to give certain instructions.”⁵

Mr. Appukuttan, however, argues on appeal that it is never proper to give WPI (Civ.) 105.08, because (according to him) it misstates the law for a reason – “preemption” – that has gone unappreciated by Washington appellate courts since RCW 7.70.040 was enacted 38 years ago.⁶ A (properly preserved) contention on appeal that a jury instruction misstated the law presents an issue of law. *E.g.*, *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001). Had Mr. Appukuttan’s CR 51(f) exception to Court’s Instruction No. 10 preserved his “preemption” argument – or any other argument that WPI 105.08 incorrectly states Washington law – then a *de novo* standard of review would apply to the trial court’s decision to give that instruction. *Id.*

⁴ Comment to WPI 105.08, 6 Washington Practice: Washington Pattern Jury Instructions: Civil 105.08, at 106 (3d ed. Supp. 1994); *see also Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 264, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992); *Seattle Western Indus., Inc. v. Mowat Co.*, 110 Wn.2d 1, 9, 750 P.2d 245 (1988).

⁵ *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff’d*, 127 Wn.2d 401 (1995).

⁶ *Laws of 1975-76*, 2nd ex.sess., ch. 56 § 9.

V. ARGUMENT

A. Mr. Appukuttan's CR 51(f) Exception to Court's Instruction No. 10 Did Not Preserve for Review Any of the Arguments He Makes on Appeal.

1. To obtain review on an instructional issue an appellant must have taken a CR 51(f) exception on the ground urged on appeal.

Civil Rule 51(f) provides:

Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. ***The objector shall state distinctly the matter to which he objects and the grounds of his objection,*** specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made. [Emphasis added.]

CR 51(f) has at least two purposes: “to clarify ... ***the exact points of law and reasons*** upon which counsel argues the court is committing error about a particular instruction,” *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) (emphasis added; citation omitted), and “to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial,” *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993) (citations omitted). Appellate courts take CR 51(f) seriously. “If an exception is inadequate to apprise the judge of certain points of law, ‘those points will not be considered on appeal.’” *Walker*, 121 Wn.2d at 217 (quoting *Crossen v. Skagit Cy.*, 100

Wn.2d 355, 359, 669 P.2d 1244 (1983)); *Nelson v. Mueller*, 85 Wn.2d 234, 238, 533 P.2d 383 (1975). “An appellate court may consider a claimed error in a jury instruction only if the appellant raised *the specific issue* by exception at trial.” *Van Hout*, 121 Wn.2d at 702 (emphasis added). Instructional defects not brought to the attention of the trial court in some manner before the jury is instructed may not serve as the basis for a new trial. *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994) (citations omitted). “Without a record that shows that exceptions were taken under CR 51(f) *on the grounds urged on appeal*, [an appellate court is] unable to pass upon the merits of [a] plaintiff’s case.” *Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 7, 604 P.2d 164 (1979) (emphasis added).⁷

2. Plaintiff excepted to the exercise of judgment instruction below solely on a ground that he has abandoned for appeal.

Plaintiff’s CR 51(f) exception to Court’s Instruction No. 10 was grounded solely on the contention that the evidence *in this case* did not

⁷ Even if respondents were not pointing out to the Court that plaintiff did not except to the giving of Instruction No. 10 on any of the grounds argued in his opening brief, it would be incumbent on the Court to dismiss the appeal *sua sponte* for that reason. *Bitzan v. Parisi*, 88 Wn.2d 116, 126, 558 P.2d 775 (1977) (“[I]t is our duty to notice a court rule violation [referring to CR 51(f)] when it is involved – the court *sua sponte* notices the rule violation “for our own protection and to enforce compliance with the rules of court” (quoting *State v. Badda*, 68 Wn.2d 50, 57, 411 P.2d 411 (1966) (quoting *State v. Hussey*, 188 Wash. 454, 461, 62 P.2d 1350 (1936)).

warrant giving the exercise of judgment instruction, not on arguments that the instruction should *never* be given:

[T]his instruction may be used only when the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses. Those conditions do not exist in this case because there wasn't a choice among competing therapeutic techniques.

11/28/12 RP 89, and:

It's not error to give it in cases like *Christiansen vs. Munson* [sic] when a doctor is choosing between two drugs to provide therapy, but that – this is not that kind of case....

11/28/12 RP 92. On appeal, Mr. Appukuttan has made no “this is not that kind of case” argument, so it has been abandoned. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006), *rev. denied*, 162 Wn.2d 1011 (2008); *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597, 601 n.3, 277 P.3d 670 (2011).⁸ Should he try to do so, Mr. Appukuttan cannot now raise that issue for the first time in his reply brief.⁹ *E.g.*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)

⁸ Appellant also did not order a full Verbatim Report of Proceedings, and did not list the issue on the RAP 9.2(c) statement of issues he finally provided in his “Revised Statement of Arrangements” dated May 14, 2013.

⁹ Having failed to order the Verbatim Report of Proceedings of all of the pertinent trial testimony (including the defense expert witness testimony), and having failed to raise any issue suggesting that the evidence was insufficient to sustain the jury's verdict findings of no negligence on the part of the defendants, Mr. Appukuttan cannot show that there was no evidence that defendants were confronted with a choice among competing therapeutic techniques or among medical diagnoses, which the trial court said there was, 11/28/12 RP 93, or that there was no evidence that, in arriving at the judgments they made, the defendants complied with the standard of care they were obliged to follow.

(“An issue raised and argued for the first time in a reply brief is too late to warrant consideration”).

3. None of the arguments Mr. Appukuttan makes on appeal corresponds to a ground he articulated when he took exception to Court’s Instruction No. 10 below.

Only after judgment had been entered on the jury’s “no negligence” verdict on December 28, 2012 (CP 32-34), did Mr. Appukuttan argue below that the “exercise of judgment” instruction should not be given *at all*, in *any* medical malpractice case, no matter what the evidence is. *Compare* 11/28/12 RP 89-90, 92 *with* CP 36, 39-41, 43-45, 77-81 (all filed on or after December 31, 2012). That was far too late to preserve the argument for consideration on review. The time to preserve a claim of error in the giving of the court’s instructions was no later than when the court took CR 51(f) exceptions, not after the jury had been instructed, much less after the jury had returned its verdict. Because none of the grounds upon which Mr. Appukuttan bases his assignment(s) of error to the giving of Court’s Instruction No. 10 was a ground on which his trial counsel took exception to Instruction 10 under CR 51(f), this appeal must be dismissed. *Walker*, 121 Wn.2d at 217; *Van Hout* 121 Wn.2d at 702; *Trueax*, 124 Wn.2d at 339.

B. The Arguments Mr. Appukuttan Makes on Appeal Would Fail Even if the Court Were to Overlook His Failure to Preserve Them for Appeal.

1. Washington case law repeatedly approving the giving of “judgment” instructions in medical malpractice cases compels respect for *stare decisis*.

Supreme Court decisions and rulings concerning WPI 105.08 bring *stare decisis* into play, making it incumbent on Mr. Appukuttan to demonstrate, clearly, that they should be abandoned as “incorrect and harmful”¹⁰ notwithstanding that “the principle of *stare decisis* ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’”¹¹

Washington courts have long held that it is proper and within a trial court’s discretion to give an “error of judgment” – or, as it is now titled in WPI 105.08, “exercise of judgment” – instruction, in cases where there is evidence that the defendant physician was confronted with a choice among competing therapeutic techniques or among medical diagnoses and, in arriving at a judgment, exercised reasonable care and skill within the standard of care the physician was obliged to follow. This was

¹⁰ *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Use of Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970))).

¹¹ *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)).

such a case and, as previously noted, Mr. Appukuttan is no longer arguing otherwise.

The Supreme Court, in a *per curiam* opinion in *Miller v. Kennedy*, 85 Wn.2d 151, 152, 530 P.2d 334 (1975), found that it could “add nothing constructive to the well considered opinion” of – and therefore affirmed, approved, and adopted – the Court of Appeals’ decision in *Miller v. Kennedy*, 11 Wn. App. 272, 280, 522 P.2d 852 (1974), which had approved the “*honest error of judgment*” instruction. Washington courts, with refinements to the language of the instruction, have repeatedly recognized that the instruction serves an important purpose and properly can be given as a supplement to a proper standard of care instruction in cases where the defendant physician was called upon to exercise professional judgment or, more specifically, was confronted with a choice among competing therapeutic techniques or among medical diagnoses. *Miller v. Kennedy*, 91 Wn.2d 155, 160-61, 588 P.2d 734 (1978); *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986), *Christensen v. Munsen*, 123 Wn.2d 234,248-49, 867 P.2d 626 (1994); *Vasquez v. Markin*, 46 Wn. App. 480, 487-89, 731 P.2d 510 (1986), *rev. denied*, 108 Wn.2d 1021 (1987); *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 263-64, 828 P.2d 597, *rev. denied*, 119 Wn.2d 1020 (1992); *Gerard v. Sacred Heart Med. Ctr.*, 86 Wn. App. 387, 388-89, 937 P.2d 1104, *rev. denied*, 133 Wn.2d 1017

(1997); *Ezell v. Hutson*, 105 Wn. App. 485, 488-92, 20 P.3d 975, *rev. denied*, 144 Wn.2d 1011 (2001); *Housel v. James*, 141 Wn. App. 748, 760, 172 P.3d 712 (2007); *Fergen v. Sestero*, 174 Wn. App. 393, 298 P.3d 782 (2013).

As the Court of Appeals in *Miller*, 11 Wn. App. at 280, and as the Supreme Court in adopting the opinion of that court in *Miller*, 85 Wn.2d at 152, reasoned in approving the use of the instruction:

The efforts of a physician may be unsuccessful or the exercise of one's judgment be in error without the physician being negligent so long as the doctor acted within the standard of care of his peers.... A doctor is liable only for misjudgment when he arrived at such judgment through a failure to act in accordance with the care and skill required in the circumstances. A mistake is not actionable unless it is shown to have occurred because the doctor did not perform within the standard of care of his practice. [Citations omitted.]

In a subsequent appeal in the same case, *Miller*, 91 Wn.2d at 160-61, the Supreme Court reiterated approval of the "error of judgment" instruction in cases where the physician was called upon to exercise professional judgment.

Some eight years later, in *Watson*, 107 Wn.2d at 164-67, the Supreme Court, reviewing a Court of Appeals decision, *Watson v. Hockett*, 42 Wn. App. 549, 555-57, 712 P.2d 855 (1986), again examined the instruction, made changes to its wording, and delineated the

circumstances under which it properly could be given. It disagreed with the Court of Appeals' rejection of the "error of judgment" instruction approved in *Miller* as confusing, unnecessary, and an improper statement of the law that had altered the standard of care that the legislature set forth in RCW 7.70.040 since *Miller*, concluding instead that, when "given in connection with a proper standard of care instruction" and "used in the manner and form approved herein," the error of judgment instruction supplements and clarifies the standard of care and serves an important purpose to:

provide useful watchwords to remind judge and jury that medicine is an inexact science where the desired results cannot be guaranteed, and where professional judgment may reasonably differ as to what constitutes proper treatment.

Watson, 107 Wn.2d at 166-67 (quoting J. Perdue, *Texas Medical Malpractice*, ch. 2, "Standard of Care", 22 Hous. L. Rev. 47, 60 (1985)).

Reaffirming that the "error of judgment" instruction is proper and reflects an accepted principle of law, the Supreme Court in *Watson*, 107 Wn.2d at 164-65, directed a change in the *wording* of the instruction approved in *Miller* to delete "honest," thereby removing the basis for the concerns the Court of Appeals in *Watson*, 42 Wn. App. at 555-57, and courts in other jurisdictions had expressed in disapproving "honest," "good faith," "mere," or "bona fide" error of judgment instructions. The

Supreme Court indicated that the instruction is “to be given with caution”

and circumscribed when the instruction properly may be given:

In the first place, as its terms make clear, it applies only where there is evidence that in arriving at a judgment, “the physician or surgeon exercised reasonable care and skill, within the standard of care he [or she] was obliged to follow.” Secondly, its application will ordinarily be limited to situations where the doctor is confronted with a choice among competing therapeutic techniques or among medical diagnoses. [Footnote omitted.]

Watson, 107 Wn.2d at 165.

Contrary to Mr. Appukuttan’s assertions, *App. Br. at 15*, and as the Court of Appeals concluded in *Ezell*, the Supreme Court’s statements in *Watson* cannot be dismissed as dictum. As the *Ezell* court appreciated, “[t]he [*Watson*] Court’s discussion regarding [the error of judgment] instruction is central to its holding and we conclude that it is binding on this court.” *Ezell*, 105 Wn. App. at 489-90. And, in any event, the Supreme Court, eight years after *Watson*, re-affirmed the propriety of giving the then “error of judgment” pattern jury instruction. *Christensen*, 123 Wn.2d at 248-49. When *Christiansen* was decided, the pattern instruction provided that:

A physician is not liable for an error of judgment if, in arriving at that judgment, the physician exercised reasonable care and skill, within the standard of care the physician was obliged to follow.

In *Christensen*, the Supreme Court held that the instruction accurately stated the law and was not a comment on the evidence, and reiterated the circumstances it had set forth in *Watson* for proper use of the instruction. *Christensen*, 123 Wn.2d at 248-49. Since *Christensen*, the Supreme Court has denied review of decisions affirming use of the pattern instruction in *Gerard*, 133 Wn.2d 1017 (1997), and *Ezell*, 144 Wn.2d 1011 (2001).

After this Court's decision in *Christensen*, the Washington Pattern Jury Instruction Committee modified WPI 105.08, substituting the word "exercise" for the word "error," which courts in other jurisdictions had found controversial. As the Committee explained the change:

In *Christensen v. Munsen*, ... the Supreme Court approved the use of a similar instruction modified in accordance with *Watson* [*v. Hockett*, 107 Wn.2d 158]. See also *Ezell v. Hutson*, 105 Wn. App. 485, 20 P.3d 975 (following *Watson* but questioning the need for the instruction). The same cautions for its use were repeated by the court.

Nevertheless, there has been considerable *criticism of this type of instruction* (in Washington and elsewhere), which *has focused on the use of the term "error."* The Supreme Court of Oregon, in expressing its disapproval of the use of the word, made the following observation:

To state that a doctor is not liable for bad results caused by an error of judgment makes it appear that some types of negligence are not culpable. It is confusing to say that a doctor who has acted with reasonable care has nevertheless committed an error of judgment because untoward results occur. In fact, bad results notwithstanding, if the doctor did not breach the

standard of care, he or she by definition has committed no error of judgment. ***The source of the problem is the use of the word “error.” Error is commonly defined as “an act or condition of often ignorant or imprudent deviation from a code of behavior.”*** Webster’s Third New International Dictionary 772 (unabridged 1971). These sentences could lead the jury to believe that a judgment resulting from an “ignorant or imprudent deviation from a code of behavior” is not a breach of the standard of care.

Rogers v. Meridian Park Hosp., 307 Or. 612, 620, 772 P.2d 929, 933 (1989). See also Hirahara v. Tanaka, 87 Haw. 460, 959 P.2d 830 (1998) (adopting the *Rogers* court’s analysis).

Sharing these concerns, while also ***recognizing the wisdom of the Watson court’s conclusion that it can sometimes be helpful to remind jurors that “medicine is an inexact science where the desired results cannot be guaranteed, and where professional judgment may reasonably differ,”*** 107 Wn.2d at 167, the committee published this rewritten instruction in the fifth edition.

Comment to WPI 105.08, 6 Washington Practice: Washington Pattern Jury Instructions: Civil 105.08, at 613 (6th ed. 2012) (emphases added).

As modified, the pattern jury instruction, WPI 105.08, now the “exercise of judgment” instruction, does not use the controversial word “error” but retains *Watson*’s wise reminder that medicine is an inexact science where professional judgment may reasonably differ, by stating:

A physician is not liable for selecting one of two or more alternative [courses of treatment][diagnoses], if, in arriving at the judgment to [follow the particular course of treatment] [make the particular diagnosis], the physician

exercised reasonable care and skill within the standard of care the physician was obliged to follow.

That instruction was given in this case as Court's Instruction 10. CP 23.

By giving the exercise of judgment instruction, a trial court focuses the jury's fact finding on the essential requirement, imposed by RCW 7.70.040, that the plaintiff prove that the defendant physician *failed to exercise* the requisite degree of skill, care, and learning in arriving at a diagnosis or providing a treatment. Without an exercise of judgment instruction, a plaintiff's counsel can (and will) ask a jury to find malpractice simply because, regardless of what skill, care, and learning the defendant physician exercised, the defendant physician missed a diagnosis, or provided a treatment that failed.

A recent example is *Fergen v. Sestero*, 174 Wn. App. 393, where a doctor was sued for alleged malpractice in diagnosing a week-old, nonpainful lump on a man's ankle as a benign cyst, rather than as an exceedingly rare Ewing's sarcoma, a cancer that is rarer still as a soft-tissue lump on the ankle. The Court of Appeals affirmed judgment for the defendant based on a jury finding of no negligence because there was testimony in the record that the defendant had considered but rejected cancer as the likely cause of the soft-tissue lump on the man's ankle, making the case one for which use of the exercise of judgment instruction

is permissible and appropriate. By giving the exercise of judgment instruction in a case such as *Fergen*, a trial court properly prevents a plaintiff from arguing (at least authoritatively) that, because Ewing's sarcoma is so deadly and tests for it would have led to its earlier diagnosis, it was negligent for a doctor presented with a new nonpainful lump on an ankle not to order tests for sarcoma, even if the *standard* of care allowed the diagnosis of benign cyst to be based on a judgment that sarcoma was highly unlikely. The exercise of judgment instruction properly focuses the jury on the process the defendant doctor followed in real time, not on what the outcome proved to be in retrospect.

2. Respect for *stare decisis* cannot be avoided by using the word "preemption" to characterize appellant's renewal of previously discredited arguments that WPI 105.08 is incompatible with RCW 7.70.040.

Mr. Appukuttan asserts, *App. Br. at 1*, that "[t]his is the first case to consider whether the 'exercise of judgment' instruction, WPI 105.08 is preempted by ... RCW 7.70[.040]....," which was enacted in 1975. That assertion is audacious, to say the least. Apparently, simply because appellant has chosen to use the term "preempted" in making his argument, it is not supposed to matter that:

(1) *Watson* approved the use, in appropriate cases, of an *error* of judgment instruction to supplement and clarify the standard of care stated

in the very statute that Mr. Appukuttan contends “preempts” its use, RCW 7.70.040; or

(2) the Supreme Court in *Watson* overruled lower court rulings holding the instruction confusing and an improper statement of the law set out in RCW 7.70.040; or

(3) *Christensen* re-approved use of an *error* of judgment instruction in a decision that rejected arguments that the instruction states the law inaccurately and comments on evidence; or

(4) *Gerard*, 86 Wn. App. at 388, expressly rejected a plaintiff’s arguments (a) that the *exercise* of judgment pattern instruction “alters the statutory standard of care,” (b) “allow[s a] jury to relieve [a defendant health care provider] based on an evaluation of the provider’s judgment processes which may or may not have occurred,” and (c) “is contrary to the objective standard of care established in RCW 7.70.040”; or

(5) the Supreme Court denied review in *Gerard*; or

(6) the Supreme Court denied direct review in, and then denied review of the Court of Appeals decision in, *Ezell*, 105 Wn. App. at 492, which holds – partly based on *stare decisis* – that the plaintiffs had “failed to establish that the [exercise of judgment] instruction is a misstatement of the law, or that it is ambiguous and misleading.”

But, of course it *does* matter that the Supreme Court repeatedly has held that WPI 105.08 is a correct statement of the law that may be given to supplement and clarify a proper medical malpractice standard of care instruction, and that the Supreme Court has since declined to review Court of Appeals' decisions affirming use of the exercise of judgment instruction. That is what *stare decisis* is about. When a rule of law has been settled, it is not lightly turned on its head.

Because the compatibility of the "error of judgment" pattern instruction with RCW 7.70.040 has been well settled by *Watson*, *Christiansen*, and the several denials of review cited above, the only question left is whether Mr. Appukuttan has made the necessary case for departing from *stare decisis* and repudiating the decisions that have approved of the use of the instruction in proper cases (which Mr. Appukuttan has implicitly conceded on appeal this case is, having abandoned any argument he made to the contrary below). Mr. Appukuttan has not come close to making such a case.

“The doctrine of *stare decisis* ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’” *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Use of Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d

508 (1970))). Our Supreme Court “endeavor[s] to honor the principle of stare decisis, which ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)). Mr. Appukuttan does not even acknowledge *stare decisis*, much less make the case for disrespecting it in this case. He does not even mention the reasons why the Supreme Court has authorized the giving of “judgment” instructions in medical malpractice cases, and thus has failed to establish any requisite condition for declining to honor *stare decisis* and has provided no basis for this court to repudiate past appellate decisions.

C. *Branom v. State Does Not Support Yet Another Challenge to WPI 105.08 Even Re-Framed in “Preemption” Terms.*

Mr. Appukuttan argues that, because it was decided after *Christensen*, *Branom v. State*, 94 Wn. App. 964, 974 P.2d 335, *rev. denied*, 138 Wn.2d 1033 (1999), provides a heretofore unappreciated predicate for a “preemption” argument. *Branom* changed nothing having to do with the propriety of giving an “error” or “exercise” of judgment instruction. *Branom* held that the parents of a newborn with severe neurological impairment could not personally assert “informed consent”

claims against the infant's neonatologist under RCW 7.70.050, could not style an "informed consent" claim as a malpractice claim, and could not assert claims for negligent infliction of emotional distress for an injury that occurred as a result of health care because negligent infliction of emotional distress is not among the three causes of action authorized by RCW 7.70.030 for claims based on such injuries.

Branom was an appeal from a summary judgment dismissal. In holding that RCW 7.70.030 specifies and limits the causes of action that may be asserted to recover for injury occurring as a result of health care, the *Branom* court neither said nor implied anything about the propriety of giving an "error" or "exercise" of judgment instruction like WPI 105.08 to supplement or clarify a standard-of-care instruction. The Court of Appeals that decided *Branom* was not called upon to address such matters and, in any event the Supreme Court had already addressed such matters five years earlier in *Christensen*, and two years earlier had denied review in *Gerard*. Had the Court of Appeals in *Branom* been called upon to address those issues, it would have been bound under the doctrine of *stare decisis* to follow *Christensen*. So is this Court.

Mr. Appukuttan's "preemption" argument proceeds, as did arguments rejected in *Watson* and *Christensen*, from the premise that the exercise of judgment instruction is incompatible with RCW 7.70.040 and WPI

105.02. But there is no such incompatibility. *Christensen* holds that RCW 7.70.040's standard of care is compatible even with the "error" of judgment instruction that has since been reframed as an "exercise" of judgment instruction.

Moreover, WPI 105.08 does not, as Mr. Appukuttan maintains, *App. Br. at 23*, protect a defendant physician from liability as long as the physician claims to have exercised some judgment, without regard to whether he or she failed to follow the RCW 7.70.040 standard of a reasonably prudent health care provider. Mr. Appukuttan ignores the fact that WPI 105.08 is explicitly linked *to* that standard of care, because it provides that an exercise of judgment in following a particular course of treatment or making a diagnosis is one for which a physician is not liable "if ... the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow," which is obviously a reference to the standard of care stated in WPI 105.02, which in turn accurately states the standard of care set forth in RCW 7.70.040, and without which the Comment to WPI 105.08 says WPI 105.08 should not be given and with which WPI 105.08 was given in this case. CP 22, 23.

D. WPI 105.08 Does Not Require a Plaintiff to Prove a Negative.

Mr. Appukuttan complains that WPI 105.08 requires a plaintiff "to disprove that 'a physician is not liable'," *App. Br. at 2*, and/or to "prove

the physician never really made any choice or exercised any judgment, but instead is acting in bad faith or lying in claiming that he did,” *App. Br. at 21*. Such arguments are wholly rhetorical and simply wrong. Clarifying what constitutes a violation of the standard of care by informing a jury what does *not* constitute a violation, and focusing the jury on the standard of care instruction’s use of the phrase “failure to *exercise*,” is not the same as imposing an additional affirmative burden of proof or persuasion. Mr. Appukuttan offers no authority suggesting that it is the same.

Giving WPI 105.08 together with WPI 105.02 requires a plaintiff to prove that the defendant physician failed to exercise the care specified in RCW 7.70.040 when the physician exercised his or her judgment in choosing between alternative treatments or diagnoses. What giving both instructions prevents, and rightly so, is a plaintiff being able to argue that a jury should hold a defendant physician liable for malpractice simply because, in retrospect, the physician’s choice of diagnosis proved to be incorrect or choice of treatment failed to cure, even though in arriving at such choice the physician complied with the applicable standard of care.¹²

¹² Mr. Appukuttan seems to complain about statements defense counsel made in closing, *App. Br. at 9-10*, but has not shown that he objected to any such statements below, much less assigned error to any adverse ruling the trial court made in response to any such objection.

Contrary to Mr. Appukuttan's assertions, *App. Br. at 19, 21-23*, WPI 105.08 is a far cry from the instruction disapproved in *Dinner v. Thorp*, 54 Wn.2d 90, 98, 338 P.2d 137 (1959). The *Dinner* instruction stated that, when a physician's decision depends on an exercise of judgment, the law "requires only that the judgment be made in good faith." The Supreme Court held that that portion of the instruction "indicates to the jury that the exercise of judgment in good faith alone absolves the respondent from liability, irrespective of his exercise of such skill and learning as is usually used by physicians...." *Dinner*, 54 Wn.2d at 98.¹³ WPI 105.08 does not say or indicate any such thing. The element of "good faith" does not appear in WPI 105.08, nor does the term "error," which was still part of the pattern instruction when *Christiansen* held it correctly stated Washington law in 1994.¹⁴ Under WPI 105.08 as it was

¹³ The *Dinner* court found no problem with earlier sentences in the same instruction that stated: "A physician is not liable for damages consequent upon an *honest mistake* or an error in judgment in making a diagnosis or in determining upon a course of procedure where there is reasonable doubt as to the nature of the physical conditions involved. If a physician brings to his patient care, skill, and knowledge he is not liable to the patient for damages resulting from his *honest mistakes or a bona fide error* of judgment [emphases supplied]." The terms "honest mistake," "bona fide," and "error" were eliminated long ago from what is now WPI 105.08.

¹⁴ It is not true that *Miller v. Kennedy* imposed on plaintiffs alleging medical malpractice a twin burden of proving, first, that the physician violated the applicable standard of care and, second, that the physician did not make an honest error of judgment in choosing to treat the plaintiff's condition. *App. Br. at 14*. Neither *Miller* nor any subsequent decision holds or suggests that a plaintiff has to disprove anything and, in any event, "honest error of judgment" instructions (of which *Miller* approved) are no longer given. The pattern instruction does not use the word "honest," and refers to exercise of judgment rather than error of judgment for the reason explained in the Comment to WPI 105.08, 6 Washington

given in this case, an exercise of judgment protects a physician from liability, but only (a) when, according to the evidence, the exercise of judgment took the form of a choice between alternative treatments or diagnoses and (b) only “if, in arriving at the judgment, ... the physician exercised reasonable care and skill *within the standard of care the physician was obliged to follow.*” Unlike the *Dinner* instruction, no part of WPI 105.08 de-links the physician’s exercise of judgment from the applicable standard of care. Rather, WPI 105.08 binds the two together.

E. WPI 105.08 Does Not Dictate a Defense Verdict for Any Physician Who Claims to Have Exercised Some Judgment, Nor Does it Make Plaintiff’s Burden of Proof “Impossible” or “Unseemly”.

Mr. Appukuttan asserts, *App. Br. at 19, 21-23*, that the exercise of judgment pattern instruction imposes an “impossible” or “unseemly” burden of proof on a medical malpractice plaintiff and is tantamount to directing a defense verdict because the published appellate decisions rejecting challenges to the instruction involved appeals from defense verdicts. That reasoning is fallacious. Unseemliness is hardly a legal standard, and the fact that medical malpractice plaintiffs sometimes challenge “exercise of judgment” instructions on appeal does not tell us that giving WPI 105.08 directs a verdict for the physician. When a jury returns a plaintiff’s verdict even though it was instructed under WPI

Practice: Washington Pattern Jury Instructions: Civil 105.08, at 612-13 (6th ed. 2012) (quoted at pages 18-19, *supra.*).

105.08, an appellate court, if there is an appeal, typically is not called upon to address whether it was proper to give that pattern instruction. Because *Christiansen* holds that WPI 105.08 correctly stated the law even before the instruction was reworded as an “exercise” rather than an “error” of judgment instruction, even if it were true that medical malpractice plaintiffs do seldom win at trial when the instruction is given, that does not mean that the law needs to be changed. Rather it means that plaintiffs’ lawyers should be more selective in taking cases or deciding which cases to take to trial. It certainly does not mean that courts should give, or refrain from giving, instructions, to enable plaintiffs’ lawyers to argue that medicine is or should be an exact science requiring doctors to answer in damages for any missed diagnosis or unsuccessful treatment.

F. Appellant’s Analogy to Traffic, Product Liability, Pollution, and Building Code Violation Cases is Inapt.

Mr. Appukuttan concludes by asserting, *App. Br. at 24*, that, in a case involving running a red light, or selling defective products, or polluting, or violating a building code, no court would instruct a jury that there is no liability if the defendant was confronted with a choice. The proposed analogy is inapt.

Product liability is not based on a standard of care at all; it is strict liability. *Falk v. Keene Corp.*, 113 Wn.2d 645, 650-52, 782 P.2d 974

(1989). So is liability for actively polluting. See *Weyerhaeuser Co. v. Aetna Casualty & Sur. Co.*, 123 Wn.2d 891, 909, 874 P.2d 142 (1994) (“Environmental statutes impose liability, often without fault, on polluters in order to safeguard society in general”).¹⁵ Physicians typically are subject to profession-specific standards of care that expert testimony is needed to establish. E.g., *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). Traffic accident cases typically are not subject to a profession-specific standard of care.

An analogy that would make more sense here would be to legal malpractice cases because lawyers, like physicians, are typically subject to liability for malpractice only upon proof that they have violated a profession-specific standard of care. If Mr. Appukuttan were suing his lawyer for errors in making tactical decisions at the trial below, the lawyer surely would request, and might well persuade the trial court to give, an exercise of judgment instruction. That is because the lawyer would be able to cite *Cook v. Clausing*, 73 Wn.2d 393, 438 P.2d 865 (1968), a legal

¹⁵ Mr. Appukuttan’s reference to building code violations is puzzling (a) because building and other similar municipal codes do not typically serve as a basis for tort liability, see *Jackson v. City of Seattle*, 158 Wn. App. 647, 654, 244 P.3d 425 (2010), and (b) because in litigation relating to building code violations courts typically sit in an appellate capacity and do not empanel juries to find facts under instructions about standards of care. Nor are respondents aware of a decision, in a case involving an alleged building code violation where a jury was empaneled, that holds or suggests that an “exercise of judgment” could never be given to clarify a standard of care instruction, assuming a standard of care instruction was called for. Absent a more concrete example to address, respondents find it difficult to offer more of a comment on appellant’s attempt to analogize medical malpractice cases to building code violation cases.

malpractice decision that implicitly approved use of a “mere error of judgment” instruction if it is properly linked to the applicable standard of care, as WPI 105.08 is for medical malpractice cases. *See also Halvorsen v. Ferguson*, 46 Wn. App. 708, 717, 735 P.2d 675 (1986), *rev. denied*, 108 Wn.2d 1008 (1987) (“mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice”), and Comment to WPI 107.04, 6 Washington Practice: Washington Pattern Jury Instructions: Civil 107.04, at 14 (6th ed. Supp. 2013) (“Practitioners will need to decide in a particular [legal malpractice] case whether it would be appropriate to supplement this instruction to address the exercise of judgment ...,” citing *Cook* among other decisions). Exercise of judgment instructions thus are not unique to medical malpractice cases, as appellant seems to argue they are but should not be. They may not be appropriate in all cases because of the standard of care that applies to the claim, but they are appropriate and provide “useful watchwords” in certain kinds of cases in which the standard of care involves an exercise of professional judgment to make decisions without the benefit of exact science.

VI. CONCLUSION

Mr. Appukuttan did not preserve for review through a CR 51(f) exception at trial any of the arguments he makes on appeal concerning the giving of the “exercise of judgment” pattern instruction. And, he has

abandoned the sole ground on which he did make a CR 51(f) exception to that instruction below. Even if this Court overlooks Mr. Appukuttan's failure to preserve his arguments for review and reaches the merits of his arguments, the trial court properly gave WPI 105.08 together with WPI 105.02 for the reasons stated above, properly entered judgment on the jury's defense verdict finding no negligence, and properly denied plaintiff's motion for a new trial. This Court should affirm.

RESPECTFULLY SUBMITTED this 16th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 16th day of July, 2013, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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